Nos. 80-1012, 80-1030, and 80-1052

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BAXTER RICE, DIRECTOR, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA,
Petitioner;
BOHEMIAN DISTRIBUTING COMPANY,
Petitioner;
WINE & SPIRITS WHOLESALERS OF CALIFORNIA,
Petitioner,

v.

NORMAN WILLIAMS COMPANY, et al.,
Respondents.

On Writ Of Certiorari To The Court Of Appeal, Third Appellate District, Of The State Of California

REPLY BRIEF OF PETITIONER BOHEMIAN DISTRIBUTING COMPANY

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PARTIES

The parties to the proceeding, in addition to petitioner, a California corporation and an intervenor below, are:

1. Baxter Rice, Director, Department of Alcoholic Beverage Control.

2. Wine & Spirits Wholesalers of California, a California corporation, another intervenor below.

3. Norman Williams Company, a California corporation; Schwab Distributing Company, Inc., a California corporation doing business as Gold Coast Wines & Spirits; Lewis-Westco & Co., a California corporation; Frederica Auldridge, doing business as South Bay Liquor; Green Cat Liquors, Inc., a California corporation; Ralph E. Pierce and Sharon L. Pierce, doing business as Texas Liquor House; and William Kirby Jr. and Shirley D. Kirby, doing business as House of Fine Spirits.

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ARGUMENT

I. A.B. 499 Does Not Conflict With The Sherman Act

Our opening brief argues that A.B. 499 facilitates intra-brand restraints that foster interbrand competition—the pro-competitive restraints approved in *Continental T.V., Inc.* v. *GTE Sylvania Corp.*, 433 U.S. 36 (1977). We also argue that A.B. 499 does not go beyond *GTE Sylvania* because restraints aided by A.B. 499 are voluntary and remain subject to Sherman Act scrutiny and sanction. *Cantor* v. *Detroit Edison Co.*, 428

U.S. 579, 592 (1976). Respondents argue that the restraints aided by A.B. 499 are different from the restraints approved in *GTE Sylvania* because in *GTE Sylvania* the restraints were imposed by a franchisor upon his franchisees, whereas A.B. 499 allows a distiller to restrain "legal" resales of liquor (Br. 17-20). According to respondents, when a restraint applies to merchandise "legally" acquired, the restraint should be declared illegal *per se.* (Br. 9-16).

When Respondents say that liquor is "legally" acquired they mean that the person who wants to import the liquor into California purchased it from a wholesaler in another state, e.g. Oklahoma, and that the Oklahoma wholesaler had purchased it from a distiller without any contractual prohibition against resale outside of Oklahoma. Since Oklahoma law was thought to forbid such territorial restraints, every sale of liquor by an Oklahoma wholesaler for delivery in California was a "legal" resale. Thus, what Respondents want to be declared *per se* illegal is a California statute that gives a distiller the same right to control the distribution of its liquor into California that the distiller would have been able to exercise by private contract with its customers outside California, but for Oklahoma law. The *per se* rule respondents advocate would not only deny to liquor customers in California the benefits of intra-brand restraints available in all other branches of commerce, but would have the anomalous result of judging a restraint by a harsher standard when aided by a state statute than when aided by judicial enforcement of a private contract. It is hard to imagine a category of conduct less suitable for *per se* condemnation. Cf. *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9-10, 19-20 (1979).

Respondents give no reason why an intra-brand restraint imposed by statute should be judged more harshly than when imposed by contract. Respondents say, instead, that the Supreme Court of California has found as a "fact" that California's system of rules for the distribution of liquor restricts intra-brand competition without providing offsetting benefits (Br. 22). See *Rice* v. *Alcoholic Beverage Control Appeals Board*, 21 Cal. 3d 341, 579 P.2d 476 (1978). There are three reasons why *Rice* does not support respondents.

First, *Rice* was concerned with a system of resale price maintenance. Resale price maintenance has long been deemed unlawful *per se,* and findings with respect to it hardly govern other systems.

Second, there can be no "factual" findings about A.B. 499 when that statute has yet to be placed into effect. Indeed, *Rice* was decided the year before A.B. 499 was enacted.

Third, even if *Rice* stands for what respondents think it stands for, it does not bind this Court in considering the meaning of the Sherman Act, a federal statute. A statute such as A.B. 499 could not be unlawful *per se* in California, lawful *per se* in New York, and subject to the Rule of Reason in Minnesota, with the difference depending on "factual" asides in opinions of state courts. See *Minnesota* v. *Clover Leaf Creamery Co.,* 499 U.S. 456, xxx n.6 (1981) (holding the Supreme Court not bound by purported "factual" finding of a state's supreme court that a state statute served no significant purpose).[1]

II. Respondents' Additional Arguments in Support of the Judgment are not Sufficient to Support It

Respondents offer a number of arguments that were made in, but not passed on by, the Court of Appeal. These arguments are properly before the Court because "the prevailing party may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted." *United States* v. *New York Telephone Co.,* 434 U.S. 159, 166 n.8 (1977). Respondents' arguments, if not dispatched now, could unduly prolong this litigation on remand, and we therefore believe that the Court should address them.

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[1] Respondents add factual assertions of their own, citing statements in a magazine and in respondents' exhibits (Br. 4-5, 20-21, 25). For example, respondents imply that no liquor retailer in California can benefit from point-of-sales services furnished by a wholesaler in California (Br.20). There has been no trial in this case or other factual determination. Respondents avoided any factfinding by seeking a mandate directly from a California appellate court. Respondents assertions of "fact" therefore must be disregarded.

A. Section 205 of the FAAA does not preempt A.B. 499

Respondents rely (Br. 33-34) on Section 205 of the Federal Alcohol Administration Act (the FAAA), which forbids a

> distiller . . . [t]o require, by agreement or otherwise, that any retailer . . . of distilled spirits . . . purchase any such products from any such person to the exclusion in whole or in part of distilled spirits . . . offered for sale by other persons in interstate . . . commerce . . . if the direct effect of such requirement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate . . . commerce . . . .

27 U.S.C. §205(a)(1976).

Section 205(a) prohibits certain exclusive dealing arrangements; distiller *A* cannot sell to retailer *X* on condition that *X* refrain from purchasing spirits from distiller *B*, if such a prohibition would have the forbidden effect. Section 205 simply does not deal with state statutes such as A.B. 499. A distiller that designates a wholesaler under A.B. 499 does not insist that the wholesaler refrain from buying another distiller's products. Section 205 does not deal with the wholesale trade (the sole purview of A.B. 499) or with the number of firms to which a distiller must sell.

The Court has treated Section 205(a) as its words suggest: as a statute banning exclusive-dealing arrangements "analogous to those prohibited by the antitrust laws." *Black* v. *Magnolia Liquor Co.*, 355 U.S. 24, 25-26 (1957), quoting from H.R. Rep. No. 1542, 74th Cong., 1st Sess. 12 (1935). Respondents' approach, in contrast, would extend Section 205(a) far beyond its language to prohibit all intra-brand restraints—restraints of a sort compelled by the laws of many states and authorized by the laws of many laws of many more. As respondents construe the statute, any refusal to sell to any firm that seeks to buy would be unlawful, whether or not the distiller insisted that the customer not deal with other distillers.

It is unlikely that Congress intended, in 1935, to make such substantial inroads on state rules; if it had any such intent, surely it would have said so, yet respondents cite no legislative history to that effect.

At all events, even if Section 205(a) bears on arrangements of the sort contemplated by A.B. 499, it is necessary to consider the clause stipulating that the exclusive dealing contract is unlawful only if that would "prevent, deter, hinder, or restrict other persons from selling or offering for sale" other spirits. This clause tracks the analysis of *GTE Sylvania*. An exclusive dealing contract would be unlawful, under Section 205(a), only if it had anticompetitive effects in the liquor market by stifling opportunities of other distillers. Respondents do not contend that A.B. 499 stifles other distillers or forecloses their access to outlets, and the respondents therefore have not made out any claim under Section 205(a).

B. A.B. 499 does not violate the Equal Protection Clause

Respondents' claim that A.B. 499 impermissibly discriminates against them in favor of importers designated by distillers is also wide of the mark. State regulation is afforded great latitude when the alleged discrimination is between economic classes only, i.e., does not involve a suspect class such as race or gender, and if any set of facts supports it. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976); *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976). The presumption in favor of validity is especially strong in the case of liquor regulation, because of the second section of the Twenty-first Amendment. See *California* v. *La Rue*, 409 U.S. 109 (1972), *reh. denied*, 410 U.S. 948 (1973); *Joseph E. Seagram & Sons* v. *Hostetter*, 384 U.S. 35, *reh. denied*, 384 U.S. 967 (1966).

A.B. 499 meets the Equal Protection test because the "discrimination" against importation of non-designated branded liquor is supported by the fact that the statute will foster interbrand competition, for reasons spelled out in *GTE Sylvania* and pp. 11-15 of our opening brief. If the Court holds that A.B. 499 is consistent with the Sherman Act, that finding will entail a conclusion that the designation distinction drawn by the statute is not preposterous or irrational.

C. A.B. 499 does not violate the Due Process Clause

Respondents' argument (Br. 35-36) that A.B. 499 violates the Due Process Clause fares no better.[2] Respondents say that there is "basic unfairness [in] allowing one group of businessmen to exclude their competitors" (Br. 35), but this is a bald assertion of economic substantive due process of a sort long rejected. The Court has repeatedly sustained statutes that effectively exclude some competitors from the marketplace. See, e.g., *Clover Leaf Creamery, Co., supra; New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 439 U.S. 96 (1978); *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117 (1978); *Cleland* v. *National College of Business*, 435 U.S. 213, 215 n.6 (1978); *City of New Orleans* v. *Dukes*, 427 U.S. 297 (1976); *Currin* v. *Wallace*, 306 U.S. 1, 16 (1939).

There is nothing unusual about A.B. 499 as an economic regulatory statute. It simply allows distillers to exercise a choice about the identity of the distributors of their products. Such choices—commonly enforced through the law of contracts and by terminations of buyers that will not adhere to contractual undertakings—are the routine business of business. A.B. 499 supports the ability of distillers to make and enforce such private choices for distribution in California where other states may have interfered with the ordinary contractual devices through which such choices are implemented. And although, as respondents emphasize, California has not promulgated standards to guide the private choices, there is no need for standards here any more than there is a need for standards in the law of contracts. A statute is constitutional even though it

[2] The Due Process Clause is not applicable to A.B. 499 at all unless the state's action deprives respondents of property. Respondents have not shown, or even argued, that the disappointment of their unilateral expectation to obtain spirits is a form of property. Cf. *Connecticut Board of Pardons* v. *Dumschat*, 101 S. Ct. 2460 (1981); *O'Bannon* v. *Town Court Nursing Center*, 447 U.S. 773 (1980). We do not press this point, however, because as we show in the text respondents' argument fails even if A.B. 499 deprives them of "property".

has no purpose other than to enforce private choices; indeed, this is essentially all the law of property does.[3]

CONCLUSION

For the foregoing reasons, as well as those in our opening brief, the judgment of the Court of Appeal should be reversed.

Respectfully submitted.

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[3] Respondents' attempt to analogize A.B. 499 to a licensing statute, cf. *Gibson* v. *Berryhill*, 411 U.S. 564 (1973), is therefore unpersuasive. The state does not attempt to pick and choose distributors on an arbitrary basis and to exclude certain of them from the business. It simply enforces private decisions about who will deal with whom.